

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Kirch Industrial Co. (U.S.A.) Ltd.,

Plaintiff,

v.

Kmart Corporation,

Defendants

Civil Action No. _____

COMPLAINT

Plaintiff, Kirch Industrial Co. (U.S.A.) Ltd., by its counsel, and for its Complaint against Defendant, Kmart Corporation, alleges as follows:

1. Plaintiff, Kirch Industrial Co. (U.S.A.) Ltd., is a corporation organized and existing under the laws of the State of New York, having a principal place of business at 1966A Broad hollow Road, Farmingdale, NY 11735 (hereinafter “Kirch”).

2. Upon information and belief, Defendant Kmart Corporation is a corporation organized and existing under the laws of the State of Illinois, having a principal place of business at 3333 Beverly Road, Hoffman Estates, IL 60179 (hereinafter “Kmart”).

4. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 and 1338(a) in that the Complaint sets forth a count for federal copyright infringement under 17 U.S.C. §501.

5. This Court has personal jurisdiction over the Defendant under M.G.L. 223A §3.
6. Venue is proper in this district under 28 U.S.C. §1391(b) and (c).

Count I: Federal Copyright Infringement Under 17 U.S.C. §501

Plaintiff repeats and hereby incorporates herein by reference, as though specifically pleaded herein, the allegations of Paragraphs 1-6 of this Complaint.

7. Plaintiff is the owner of Copyright Registration Case No. 1-228409611 entitled “Spoon Wall Clock” that is an original work of authorship protected as a federal copyright under 17 U.S.C. §102(a). A copy of Copyright Registration Case #1-228409611 and a copy of the deposited work as submitted with the registration are attached hereto as Exhibit A.

8. Plaintiff is the owner of Copyright Registration Case No. 1-213357291 entitled “1234Spoon Wall Clock” that is an original work of authorship protected as a federal copyright under 17 U.S.C. §102(a). A copy of Copyright Registration Case #1-213357291 and a copy of the deposited work as submitted with the registration are attached hereto as Exhibit B.

9. Plaintiff is the owner of more than fifty (50) federal copyright registrations for artistic wall clock designs.

10. Plaintiff is a well known distributor of wall clocks to small and large retail stores and to many on-line stores.

11. Plaintiff sells the copyrighted wall clock under the brands KIRCH & CO® and/or VERICHRON®.

12. Upon information and belief, Kmart sells a wall clock under the mark WALTHAM (SKU No. 04935368648) thru its on-line and retail stores in this district and throughout the United States. As of July 3, 2009, Kmart was selling its product for \$19.99.

13. On or about July 3, 2009, Plaintiff sent Defendant a letter, by certified mail, advising it that the sale of its wall clock infringed Plaintiff's copyrighted wall clock and requested Defendant to discontinue any sale of the infringing wall clocks.

14. On August 11, 2009, Plaintiff purchased a clock from Defendant's retail store located in Braintree, Massachusetts. A copy of Defendant's clock is attached hereto as Exhibit C. Plaintiff purchased the wall clock from K-Mart for \$9.99.

15. Defendant's clock is virtually identical to Plaintiff's copyrighted clock.

16. Defendant has and continues to infringe Plaintiff's copyrighted works by making, selling and/or distributing unauthorized copies of Plaintiff's protected works in violation of 17 U.S.C. §501.

17. Defendant's continued infringement after receiving actual notice of Plaintiff copyrighted works constitutes willful infringement and makes this an exceptional case

18. Defendant's continued infringement has and continues to cause monetary damage and irreparable harm to Plaintiff for which there is no adequate remedy at law.

Prayer For Relief

WHEREFORE, Plaintiff prays that this Court grant the following relief:

1. That Defendant, Kmart Corporation, and its agents, officers, employees, representatives, successors, assigns, attorneys and all other persons acting for, with, by, through or under authority from Defendant, be preliminarily and permanently enjoined from using and/or copying Plaintiff's copyrighted works or any derivative thereof, colorable imitations thereof, or any work substantially similar thereto.

2. That Defendant be held liable for all damages suffered by Plaintiff resulting from the acts alleged herein;

3. That Defendant be compelled to account for and pay to Plaintiff any and all profits derived by then from the acts alleged herein or statutory damages;
4. That Defendant be ordered to deliver up for destruction all infringing works under the custody or under the control of Defendant, including removal of any electronic infringing works from its on-line retail stores;
5. That the Court declare this to be an exceptional case and award Plaintiff treble damages, reasonable attorneys' fees, and full costs; and
6. For such and other further relief that this Court deems just and proper.

Respectfully submitted,

Kirch Industrial Co (U.S.A.) Ltd.

By its Attorney,

/s/ Steven N. Fox

Dated: August 13, 2009

Steven N. Fox (BBO #554692)

P.O. Box 251

Canton, MA 02021

(781) 821-8920